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# STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLE - NEW DEVELOPMENTS AND GENERAL DISCUSSION OF FUTURE ACTION

## Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, on criteria which might be applied when considering the concept of indigenous peoples

CONTENTS


| | | Paragraphs | Page |
|---|---|---|---|
| INTRODUCTION | | 1 - 3 | 3 |
| I. | THE DESIRABILITY OF DEVELOPING A DEFINITION OF INDIGENOUS PEOPLES | 4 - 7 | 3 |
| II. | EXISTING DEFINITIONS AND WORKING DEFINITIONS | 8 - 10 | 4 |
| III. | CRITERIA WHICH MIGHT BE CONSIDERED WHEN DELIBERATING THE CONCEPT OF INDIGENOUS PEOPLES | 11 | 5 |
| IV. | TRADITIONAL LANDS | 12 | 6 |


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CONTENTS (continued)


| | | Paragraphs | Page |
|---|---|---|---|
| V. | HISTORICAL CONTINUITY | 13 | 6 |
| VI. | DISTINCTIVE CULTURAL CHARACTERISTICS | 14 - 15 | 6 |
| VII. | NON-DOMINANCE | 16 | 7 |
| VIII. | SELF-IDENTIFICATION AND GROUP CONSCIOUSNESS | 17 - 18 | 7 |

Annexes

| | | |
|---|---|---|
| I. | Study of the Problem of Discrimination against Indigenous Populations by José R. Martínez Cobo, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1986/7/Add.4, paras. 379-382) | 9 |
| II. | Study of the Problem of Discrimination against Indigenous Populations, Preliminary report submitted by José R. Martínez Cobo, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/L.566, paras. 34 and 45) | 10 |
| III. | International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) | 11 |
| IV. | The World Bank Operational Manual Operational Directive 4.20, September 1991 | 12 |




## Introduction

1. In its resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Subcommission on Prevention of Discrimination and Protection of Minorities to establish annually a working group to meet in order to (a) review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, and (b) give special attention to the evolution of standards concerning the rights of indigenous populations. At its first session in 1982, members of the Working Group on Indigenous Populations unanimously expressed the view that sources of information should include those mentioned in Economic and Social Council resolution 1982/34 plus other indigenous organizations and groups as well as experts and recognized authorities in the field (E/CN.4/Sub.2/1982/33, para. 21). Since that time, the Working Group has maintained this open and accessible character.

2. The purpose of the present note by the Chairperson-Rapporteur is to introduce a number of criteria which might be applied when considering the concept of indigenous peoples. It is proposed that under the item of the agenda entitled "Standard-setting activities", members of the Working Group as well as representatives of observer Governments and indigenous nations and organizations, and independent experts offer their comments and observations.

3. At the twelfth session of the Working Group, the Chairperson-Rapporteur stated in her concluding comments that she considered that further consideration should be given to conceptual matters such as criteria for defining some of the terminology of the draft declaration. On that occasion, she noted that, although the Working Group had completed its draft of a declaration on the rights of indigenous peoples, it still had an important role to play in establishing a comprehensive framework of rights for indigenous peoples and in providing expert opinion on certain terms and concepts.

## I. THE DESIRABILITY OF DEVELOPING A DEFINITION OF INDIGENOUS PEOPLES

4. In this regard, the Chairperson-Rapporteur would submit that an important first question to be addressed by the Working Group is the desirability of developing a definition of indigenous peoples. It might be argued that the Working Group has enjoyed considerable success, developed a comprehensive and widely accepted draft declaration, and made numerous other contributions on the issue without feeling a need to elaborate a definition of indigenous peoples. A characteristic of the Working Group - for which it has received high praise - is its liberal and democratic spirit of openness, transparency and flexibility. Members of the Working Group have insisted that no indigenous community, organization, nation or even indigenous person from whatever region should be denied the right to express peacefully and without abuse an opinion or viewpoint. The Working Group, under the previous and the present Chairperson, has not refused the right of any indigenous participant

to take the floor at the sessions. In practice, therefore, the absence of a rigorous definition has not impeded progress under the two mandates of the Working Group.

5. Participation in the Working Group has expanded markedly since its inception in August 1982. An examination of the report of the Working Group on Indigenous Populations on its twelfth session reveals that 163 indigenous organizations were represented from 44 countries. However, it should be emphasized that the presence of a group claiming to be indigenous does not necessarily signify that it is accepted as such by members of the Working Group.

6. It will be recalled that historically speaking, indigenous peoples have suffered from definitions imposed by others. For example, in the past the criterion for membership of an indigenous population in certain countries was based upon parentage or blood quotient and this is now deemed discriminatory as it denies the right of indigenous people to determine their own membership. For this and other relevant reasons the Working Group would not consider it appropriate to develop a definition of its own without full consultation with indigenous peoples themselves.

7. Notwithstanding these qualifications and observations, the Chairperson-Rapporteur is aware of the growing interest from all sides - indigenous peoples, Governments and organizations in the United Nations system responsible for operational programmes - for guidance regarding the concept of indigenous peoples. It was noted, for example, that during the twelfth session of the Working Group a few indigenous representatives expressed the view that certain of the participants claiming status as indigenous people were not in fact so. Furthermore, several Governments which have regularly attended the Working Group as observers have stated - most recently at the fifty-first session of the Commission on Human Rights - that there are no indigenous people in their country. Finally, in the light of the proclamation by the General Assembly of the International Decade of the World's Indigenous People focusing on operational activities, concerned United Nations agencies will be obliged to ensure that the beneficiaries of special programmes and projects are indigenous people. For the above-mentioned reasons, it appears to the Chairperson-Rapporteur that some preliminary discussion on concepts related to the term indigenous peoples should take place during the thirteenth session of the Working Group with a view to guiding practice at the international level.

## II. EXISTING DEFINITIONS AND WORKING DEFINITIONS

8. The Chairperson-Rapporteur takes this opportunity to recall some principal studies, guidelines and legal instruments having a bearing on the definition of indigenous peoples. In the first place, reference may be made to the "Study of the problem of discrimination against indigenous populations" by the Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities, Mr. José R. Martínez Cobo (E/CN.4/Sub.2/1986/7 and Add. 1-4). In particular, chapter V entitled "Definition of indigenous populations" and chapter XXII entitled "Proposals and conclusions" can be noted. In the latter, attention is drawn to paragraphs 379-382 which provide



a definition of indigenous populations for the purposes of international action (see annex I). The working definition for the purposes of the Special Rapporteur's Study and contained in the preliminary report on the Study (E/CN.4/Sub.2/L.566 of 29 June 1972, paras. 34 and 45) may also be considered as helpful (see annex II). It may be recalled that the Economic and Social Council in its decision 1985/137 of 30 May 1985 expressed its appreciation for the report of the Special Rapporteur and requested its publication and wide dissemination.

9. The Chairperson-Rapporteur also draws attention to the International Labour Organization's Convention No. 169 of 1989 concerning indigenous and tribal peoples in independent countries whose article I defines the peoples to whom the Convention applies (see annex III). Finally, the definition contained in the World Bank's Operational Directive 4.20 of September 1991 may be of interest (see annex IV).

10. Since the Chairperson-Rapporteur's note is meant to stimulate discussion rather than offer a thorough consideration of the issue, reference is not made to the question of definition as it is elaborated by scholars and human rights experts whose observations may be of interest. The Chairperson-Rapporteur is also aware of the diverse legal definitions existing in different national contexts. Finally, and most important, the viewpoint of indigenous people on this question should be respected. The Working Group considered all of the aforementioned sources in the course of its deliberations of the draft declaration on the rights of indigenous peoples. Thus, it may be noted that article 8 of the draft declaration as agreed upon by members of the Working Group and adopted by the Subcommission on Prevention of Discrimination and Protection of Minorities (resolution 1994/45, annex) states that "Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such". Article 32 of the draft declaration states that "[i]ndigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions ... . Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures".

## III. CRITERIA WHICH MIGHT BE CONSIDERED WHEN DELIBERATING THE CONCEPT OF INDIGENOUS PEOPLES

11. In the aforementioned Study prepared by the Special Rapporteur, Mr. Martínez Cobo, a number of criteria were identified as relevant in any efforts to elaborate a definition. These include consideration of both objective and subjective elements such as ancestry, cultural aspects including religion, tribal organization, community membership, dress and livelihood, language, group consciousness, residence in certain parts of the country and acceptance by the indigenous community (E/CN.4/Sub.2/1986/7/Add.1, paras. 1-398). Taking into account the comprehensive work carried out by the Special Rapporteur and the experiences of the Working Group on Indigenous Populations since its establishment in 1982, it may be stated that the criteria are sufficient to determine whether a person or a community is indigenous or not.

## IV. TRADITIONAL LANDS

12. Article 25 of the draft declaration on the rights of indigenous peoples states that "[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard". In drafting this article, the Working Group recognized that a fundamental characteristic of indigenous peoples was their historical continuity with the territories they now occupy notwithstanding, as is reflected in article 27 of the draft declaration, any alienation of those lands which may have taken place over time.

## V. HISTORICAL CONTINUITY

13. Indigenous peoples, as noted by the Special Rapporteur, have "a historical continuity with pre-invasion and pre-colonial societies that developed on their territories" (E/CN.4/Sub.2/1986/7/Add.4, para. 379). In his working definition, the Special Rapporteur proposes this formulation: "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country, wholly or partially, at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial situation ..." (E/CN.4/Sub.2/L.566, para. 34). In this respect, it may be noted that some writers refer to indigenous nations and communities as "First Peoples".

## VI. DISTINCTIVE CULTURAL CHARACTERISTICS

14. Indigenous peoples possess distinctive cultural characteristics which distinguish them from the prevailing society in which they live. The draft declaration refers to these characteristics in numerous articles. For example, article 4 recognizes the right of indigenous peoples to maintain and strengthen their distinct political, social and cultural characteristics, as well as their legal systems; article 7 states that indigenous peoples should not be subject to any form of assimilation or integration. Article 12 includes in the manifestations of indigenous culture aspects such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as cultural, intellectual, religious and spiritual property; article 14 refers to histories, languages, oral traditions, philosophies, writing systems and literatures. Article 15 of the draft declaration notes that indigenous peoples may have distinctive methods of teaching and learning.

15. In article 21 of the draft declaration reference is made, inter alia, to traditional and other economic activities and article 24 provides for protection of traditional medicine and health practices. Indigenous laws, traditions and customs of land tenure are reflected in article 26 and article 29 refers to indigenous sciences, technologies and cultural

manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, and visual and performing arts. Note may also be taken of article 33 where the fact that indigenous peoples may have distinctive juridical customs, traditions, procedures and practices is recognized. These articles identify some of the elements of indigenous culture which distinguish it from the wider society in which it finds itself.

## VII. NON-DOMINANCE

16. Indigenous peoples constitute a non-dominant part of the population of the countries in which they live. Under the agenda item "Review of developments", members of the Working Group have been able to listen, over the years, to a wide range of information from representatives of indigenous peoples which indicate their non-dominant status. Very often this information has been shared by representatives of observer Governments. It may be noted that, generally speaking, indigenous people in all countries have lower incomes than the average citizen and are more likely to be unemployed. Indigenous peoples suffer worse health conditions than others in society and have less access to educational opportunities. In certain countries indigenous people may not be represented or may be underrepresented in political institutions and public life. Furthermore, as a result of their weak political situation as well as the absence of recognized title over the lands on which they live, indigenous peoples are sometimes subject to removal from their homelands and a consequent pauperization and marginalization. These and other factors constitute for indigenous peoples a significant obstacle to their human rights.

## VIII. SELF-IDENTIFICATION AND GROUP CONSCIOUSNESS

17. Two further aspects may be considered by the Working Group in connection with the concept of indigenous peoples. Firstly, it may be noted that indigenous peoples themselves have stated on numerous occasions that they are the rightful authority to define and determine whether they are indigenous and how membership is attributed. Articles 8, 9 and 32 of the draft declaration go some way to reflect this concern. Secondly, members of the Working Group are aware of the sense of group consciousness which has developed among indigenous peoples over recent years. In certain countries in the past indigenous peoples felt shame or fear to identify themselves as indigenous; today, happily, there has been a reversal of this trend and members of indigenous communities are proud to be so recognized. At the international level, a sense of common vision and experience appears to prevail among many hundreds of peoples from all regions of the world.

18. The Chairperson-Rapporteur notes that the question of indigenous peoples is developing continually as more people from different regions seek to participate in the Working Group and other international activities. It has been a fundamental tenet of the Working Group that flexibility, openness and a spirit of harmonious reflection and exchange should prevail at its sessions. The Chairperson-Rapporteur would not seek to change this philosophy. However,

as more peoples come year by year to the Working Group, it is time to make an effort to understand better what indigenous peoples consider to be their common characteristics and aspirations. The Chairperson-Rapporteur hopes that the above-mentioned comments and criteria will constitute a basis for a constructive exchange of views with the other members of the Working Group, and representatives of Governments, indigenous peoples and specialized agencies with the main purpose of protecting the Working Group as a liberal and democratic forum and the interests of indigenous peoples themselves.

ANNEX I

Study of the Problem of Discrimination against Indigenous Populations by José R. Martínez Cobo, Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1986/7/Add.4, paras. 379-382)

379. Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

380. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;

(b) Common ancestry with the original occupants of these lands;

(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);

(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);

(e) Residence in certain parts of the country, or in certain regions of the world;

(f) Other relevant factors.

381. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

382. This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

**ANNEX II**

**Study of the Problem of Discrimination against Indigenous Populations, Preliminary report submitted by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/L.566, paras. 34 and 45)**

34. In the light of these historical considerations, the following working definition is proffered:

> "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant."

45. Isolated or marginal populations. Although they have not suffered conquest or colonization, isolated or marginal population groups existing in the country should also be regarded as covered by the notion of "indigenous populations" for the following reasons: (a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there; (b) precisely because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterized as indigenous; (c) they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.

## ANNEX III

## International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169)

### Article 1

1. This Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

ANNEX IV

World Bank Operational Manual Operational Directive 4.20, September 1991

3. The terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes" describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, "indigenous peoples" is the term that will be used to refer to these groups.

4. Within their national constitutions, statutes, and relevant legislation, many of the Bank's borrower countries include specific definitional clauses and legal frameworks that provide a preliminary basis for identifying indigenous peoples.

5. Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labour or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

(a) a close attachment to ancestral territories and to the natural resources in these areas;

(b) self-identification and identification by others as members of a distinct cultural group;

(c) an indigenous language, often different from the national language;

(d) presence of customary social and political institutions; and

(e) primarily subsistence-oriented production.

Task managers (TMs) must exercise judgement in determining the populations to which this directive applies and should make use of specialized anthropological and sociological experts throughout the project cycle.

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